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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 68

T. I. M. E., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas is unreported. The opinion of the Court of Appeals (Pet. App. pp. 26-33) is reported at 252 F. 2d 178.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1958. A timely petition for rehearing was denied on February 25, 1958. The petition for a writ of certiorari was filed on May 26, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether in a suit by a motor carrier to recover charges allegedly due, which is defended on the ground that those charges are unreasonable, the court must stay its hand and refer the "reasonableness" question to the Interstate Commerce Commission.

STATUTES INVOLVED

The relevant provisions of Section 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U. S. C. 66, and of Part II of the Interstate Commerce Act, 49 Stat. 543, as amended, 49 U. S. C. 301, *et seq.*, are set forth in the appendix to the Government's brief in opposition in *Davidson Transfer and Storage Co. v. United States*, No. 96, this Term.

STATEMENT

This suit was instituted by petitioner, T. I. M. E., Inc., under the Tucker Act, to recover a certain sum allegedly due it in connection with the transportation of Government property. The United States defended on the principal ground that the rate used by petitioner in computing its charges was *prima facie* unreasonable, and moved that the proceedings be suspended to enable a reference of the "reasonableness" issue to the Interstate Commerce Commission. The District Court denied the motion and entered judgment on the basis that petitioner was entitled to the challenged rate. The Court of Appeals reversed and remanded with instructions to grant the Government's

motion. The stipulated facts, and the proceedings below, may be summarized as follows:

Petitioner, a motor carrier operating between Oklahoma City, Oklahoma and Los Angeles, California, via El Paso, Texas, transported several shipments of scientific instruments N. O. I. (not otherwise indexed) under Government bills of lading (R. 18). One of these shipments, which the parties agreed was illustrative and did not differ in material respect from the other shipments, originated at Tinker Air Force Base, Marion, Oklahoma (R. 18). It was transported over the lines of petitioner and a connecting carrier from that point to McClellan Air Force Base at Planehaven, California (R. 18-19).

At the time of this movement, there were on file with the Interstate Commerce Commission these tariffs to which petitioner was subject (R. 19).

(1) Rocky Mountain Motor Tariff Bureau Tariff No. 5-A, M. F.-ICC No. 31, providing a double first class through rate of \$10.74 per cwt. on scientific instruments N. O. I. from Marion, Oklahoma to Planehaven, California.

(2) Southwestern Motor Freight Bureau Tariff No. 1-F, M. F.-ICC No. 141, providing a rate of \$2.56 per cwt. on scientific instruments N. O. I. from Marion, Oklahoma, to El Paso, Texas.

(3) Interstate Freight Carriers Conference Tariff No. 1-C, N. F.-ICC No. A-5, providing a rate of \$4.35 per cwt. on scientific instruments N. O. I. from El Paso, Texas to Planehaven, California.

In the District Court, the Government contended that the applicable rate was a combination of the intermediate rates from Marion, Oklahoma to El Paso, Texas and from El Paso to Planehaven, California, *i. e.*, a sum of \$6.91 per cwt. It further urged that, if the court should determine that the through rate (\$10.74 per cwt.) between Marion and Planehaven was applicable as a matter of tariff construction, the proceedings should be stayed to enable the Government to obtain a determination from the Interstate Commerce Commission as to the reasonableness of that rate as applied.

Petitioner, on the other hand, asserted that the through rate was applicable (R. 20). With respect to holding the proceedings in abeyance to permit a determination of the reasonableness of the through rate as so applied, petitioner contended that the court lacked the power to do so (R. 21-22).

On June 30, 1956, the District Court ruled that the through rate was applicable (R. 31-32). On July 18, 1956, the Government moved to hold the entry of judgment in abeyance to enable it to apply within sixty days to the Interstate Commerce Commission for a determination of the reasonableness of that rate as so applied (R. 34). On December 29, 1956, the court denied the Government's motion on the ground that the Commission does not have jurisdiction to review the reasonableness of rates charged on past shipments by motor carriers. (R. 38-39). On March 5, 1957, judgment was entered for petitioner on its claims in the amount of \$14,414.82.

(i. e., the difference between the through rate and the aggregate of the intermediate rates) (R. 41-43).¹

On the Government's appeal, restricted to the referral issue, the Court of Appeals reversed. The case was remanded with directions to grant the Government's motion to hold judgment in abeyance in order to give the Government an opportunity to obtain a determination from the Interstate Commerce Commission as to the reasonableness of the through rate as applied.

The court held, citing *United States v. Western Pacific R. Co.*, 352 U. S. 59, 72 and *United States v. Chesapeake & Ohio R. Co.*, 352 U. S. 77, 81, that the Commission's lack of power to award reparations to shippers by motor carrier does not negative its authority to determine the reasonableness of a filed rate, when that issue is incident to a federally cognizable ~~course~~ ^{cause} of action pending in a district court (Pet. 26-33).

ARGUMENT

The single issue raised by the petition in this case is the same as the first issue presented in *Davidson Transfer & Storage Company, Inc. v. United States*, pending on petition for a writ of certiorari, No. 96, this Term. For the reasons set forth in our brief in opposition in the *Davidson Transfer & Storage Company* case, we respectfully submit that the petition

¹ Because a larger judgment was entered on the Government's counterclaims (\$16,942.03), the United States obtained a net recovery (R. 42).

for a writ of certiorari in the instant case should be denied.

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